

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Rolando Vasquez	Team: Squad #8	CCRB Case #: 201605421	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Wed, 06/22/2016 12:40 PM	Location of Incident: backyard of 137-08 233rd Street	Precinct: 105	S.O.L. Expires: 12/22/2017		
Date/Time CV Reported Wed, 06/22/2016 2:29 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Wed, 06/22/2016 2:29 PM		

Complainant/Victim	Type	Home Address
1. [REDACTED]		

Subject Officer(s)	Shield	TaxID	Command
1. POM Paul Kearon	26316	948363	105 PCT
2. SGT James Reilly	4143	937350	105 PCT
3. POM Morgan Sprague	19896	940762	105 PCT

Officer(s)	Allegation	Investigator Recommendation
A . POM Paul Kearon	Abuse of Authority: Police Officer Paul Kearon stopped [REDACTED]	A . Substantiated
B . POM Morgan Sprague	Abuse of Authority: Police Officer Morgan Sprague stopped [REDACTED]	B . Substantiated
C . SGT James Reilly	Abuse of Authority: Sergeant James Reilly stopped [REDACTED]	C . Substantiated
D . POM Paul Kearon	Abuse of Authority: Police Officer Paul Kearon entered the backyard of [REDACTED]	D . Substantiated
E . POM Morgan Sprague	Abuse of Authority: Police Officer Morgan Sprague entered the backyard of [REDACTED]	E . Substantiated
F . SGT James Reilly	Abuse of Authority: Sergeant James Reilly entered the backyard of [REDACTED]	F . Substantiated

### **Case Summary**

This complaint was filed by [REDACTED] on June 22, 2016 with the CCRB via phone.

On June 22, 2016, at approximately 12:40 p.m., [REDACTED] was in his backyard at [REDACTED]. [REDACTED] was stopped in his backyard by Sgt. James Reilly, PO Paul Kearon, and PO Morgan Sprague from the 105<sup>th</sup> Precinct on suspicion that he was possibly a burglar (Allegation A-C). In order to effect the stop, Sgt. Reilly, PO Kearon, and PO Sprague entered the backyard of [REDACTED] (Allegation D-F).

[REDACTED] recorded the interaction with the police officers in his backyard. [REDACTED] was not arrested or summonsed during this incident.

### **Mediation, Civil and Criminal Histories**

- This case was suitable for mediation and it was presented to [REDACTED] during his in-person interview. [REDACTED] chose to have his complaint investigated.
- The NYC Office of the Comptroller responded to a request on August 29, 2016 indicating that no notice of claim has been filed by [REDACTED] in regards to this incident (Board Review 01).
- [REDACTED] has no history of any criminal convictions in New York City (Board Review 02).

### **Civilian and Officer CCRB Histories**

- This is the first complaint filed by [REDACTED] with the CCRB (Board Review 03).
- Sgt. Reilly has been a member of the service for 11 years and has one substantiated allegation in CCRB case 201508966 for his involvement as the supervisor when other officers entered and searched the front yard of a home. The CCRB recommended a command discipline B and the NYPD has not yet issued a disposition in this case (Board Review 04).
- PO Kearon has been a member of the service for six years and has three substantiated allegations in CCRB case 201508895 involving the stop, frisk, and search of an individual. The board recommended charges for all three of these allegations and the NYPD has not yet issued a disposition in this case. PO Kearon has 14 additional allegations involving eight cases none of which indicate any pattern applicable to this case (Board Review 05).
- PO Sprague has been a member of the service for ten years and has no substantiated allegations. PO Sprague has two prior allegations involving two cases none of which indicate any pattern applicable to this case (Board Review 06).

### **Findings and Recommendations**

**Allegation A – Abuse of Authority: Police Officer Paul Kearon stopped [REDACTED]**

**Allegation B – Abuse of Authority: Police Officer Morgan Sprague stopped [REDACTED]**

**Allegation C – Abuse of Authority: Sergeant James Reilly stopped [REDACTED]**

It is undisputed that officers stopped [REDACTED] and entered the backyard to conduct the stop. The disposition of the stop hinges on the officers' motivation for engaging in this conduct.

[REDACTED] provided the following testimony regarding his actions prior to the interaction with the officers (Board Review 18). Mr. Morrison left his house at [REDACTED] and was walking to a store a couple blocks away. As he was walking, [REDACTED] saw an unmarked Impala with its lights activated. [REDACTED] turned around and went back home to get his bicycle to ride to the store instead. [REDACTED] walked down a walkway on the right side of his house toward his backyard to get his bike. In the rear of his backyard near his garage, [REDACTED]. [REDACTED] took out his phone and started taking pictures to post to SnapChat. [REDACTED] turned around and saw two plainclothes officers in his backyard. [REDACTED] did not smoke marijuana prior to this interaction and did not smell any marijuana while he was in his backyard.

Sgt. Reilly, PO Sprague, and PO Kearon offered the following generally consistent testimony about an active residential burglary pattern that existed in the 105<sup>th</sup> Precinct at the time of this incident (Board Review 07-09). Each of the officers varied in his ability to describe the particular details of the burglary pattern. Document requests to the 105<sup>th</sup> Precinct Detective Squad for an open crime pattern report (Board Review 10) and to the On-site IAB-CCRB Liaison unit for the associated complaints (Board Review 11) produced documentation that verified the general details of the burglary pattern that the officers collectively provided. The residential burglaries involved in this pattern have tended to occur during weekdays during daytime hours. Entries have occurred through rear doors and windows. There is no description of any suspects associated with this pattern. The burglaries have occurred in sectors D and B of the precinct. The incident location in this complaint falls within sector D.

In regards to the incident with [REDACTED], the officers provided the following consistent testimony (Board Review 07-09). The officers were all on routine patrol while assigned to the anti-crime team, were dressed in plainclothes, and were working in an unmarked black Chevy Impala. No calls had been received about any burglaries in the area. As they drove down 233<sup>rd</sup> Street, the three officers saw [REDACTED] leaning on the side of [REDACTED] next to a side entrance to the house. At the sight of the police car as they were driving by, [REDACTED] turned around and hurried down the walkway in the opposite direction to the backyard of the house. [REDACTED]'s flight, combined with his leaning on the side of a house near a side entrance in a burglary prone area made the officers suspect that he was possibly involved in a burglary. No commands were issued to [REDACTED] as he made his way to the back of the house. The officers followed [REDACTED] into the backyard to investigate further. [REDACTED] was in the rear of the backyard behind a shed. [REDACTED] was argumentative and not compliant in providing his ID when requested but eventually agreed to do so in his front yard. After verifying that [REDACTED] lived at the location, the officers left.

Sgt. Reilly's testimony added the following information (Board Review 07). Before the interaction that was described above, the anti-crime team was involved in a car stop a block away from [REDACTED]'s home. During this car stop, Sgt. Reilly was standing outside of his vehicle. The police car has lights near the rear window and taillights which were activated. Sgt. Reilly saw [REDACTED] coming in the direction of the officers. [REDACTED] looked at the police car, stopped, and quickly turned back around in the direction he had come. [REDACTED] was smoking and was not carrying anything. Sgt. Reilly made no further observation of [REDACTED] after he turned around and walked away. Sgt. Reilly found it strange that [REDACTED] would make an about face at the sight of the police officers. The anti-crime team drove around the block

and Sgt. Reilly made the above described observation of [REDACTED]. Based on the initial observation he made of [REDACTED] and this subsequent observation, Sgt. Reilly's suspicions were raised because he thought [REDACTED] was hiding from the officers. Sgt. Reilly could not tell if [REDACTED] was smoking alongside the house. After exiting his vehicle, Sgt. Reilly noticed a strong smell of marijuana from the front of the house which grew stronger as he got closer to the backyard of the house where [REDACTED] was. In the backyard, Sgt. Reilly could not tell if the smell of marijuana was coming specifically from [REDACTED] but he was the only person around. Sgt. Reilly was the only officer who recalled smelling the marijuana.

PO Sprague's testimony added the following information (Board Review 08). When he was leaning against the side of the house, [REDACTED] was holding a cell phone. PO Sprague's testimony was the only one in which an officer recalled [REDACTED] holding anything during this initial observation. After exiting the police car to follow [REDACTED] into the backyard, PO Sprague saw a ladder along the side of the house where [REDACTED] had been standing. PO Sprague was the only officer who recalled observing the ladder.

PO Kearon's testimony added the following information (Board Review 09). As [REDACTED] [REDACTED] was headed to the backyard after seeing the officers in their car, he repeatedly looked back over his shoulder in the direction of the officers.

The investigation consulted with Chief Prosecutor Jonathan Darche to discuss legal issues surrounding the stop allegation.

In People v. Debour, 40 N.Y.2d 210 (1976), the court established four levels of intrusion that officers may subject a citizen to during a street encounter (Board Review 12). The framework for street encounters established by Debour is also articulated for members of the service in NYPD FINEST Message #14049620 dated March 2, 2015 (Board Review 13). For any stop, the justification must exist at its inception and "the police may not justify a stop by a subsequently acquired suspicion resulting from the stop." The least intrusive encounter discussed in Debour is a request for information (a level one encounter). To initiate a level one encounter, officers must have an objective credible reason to approach the subject which need not be related to any suspicion of criminality. Officers may continue to observe but may not pursue the subject. A common law inquiry (a level two encounter) may be conducted if an officer has founded suspicion that criminality is afoot. Officers may interfere with a citizen to the extent necessary to gain explanatory information but may not forcibly seize the person. Citizens are free to refuse to answer questions and leave during level one and level two encounters. In order to stop and forcibly detain an individual (a level three encounter) officers must possess individualized reasonable suspicion that the person has committed, is committing, or is about to commit a felony or misdemeanor. An arrest (a level four encounter) may be conducted when an officer possesses probable cause that a citizen has committed a felony or misdemeanor.

In Debour the court also found that innocuous behavior, behavior susceptible of innocent as well as culpable interpretation, alone will not generate a founded or reasonable suspicion that a crime is at hand (Board Review 12). In People v. Moore, 176 A.D.2d 297 (1991) the court found that a suspect looking over his shoulder in the direction of an officer after having hurried away from the officer was innocuous behavior (Board Review 14). In People v. Hampton, 200 A.D.2d 466 (1994) the court discusses presence in a high-crime area and states "location alone does not justify police intrusion against citizens who happen to live, work, or travel in such high crime areas" (Board Review 15).

In People v. Carmichael, 2012 N.Y. App. Div. LEXIS 1038 (2012) the court considers flight as a factor in escalating an encounter (Board Review 16). The court states that "flight

combined with specific circumstances indicating that a suspect may be engaged in criminal activity can provide a justification to pursue a suspect.” However the court also states that “flight alone or with equivocal circumstances that might justify a police request for information is insufficient to justify a pursuit.”

Article 221 of NY Penal law defines the possession of marijuana as a violation. Possession of marijuana is classified as a misdemeanor when the marijuana possessed exceeds 25 grams, is burning in a public place, or is open to public view (Board Review 17).

At issue in regards to the stop of [REDACTED] is whether the officers possessed reasonable suspicion to believe he had committed, was committing, or was about to commit a felony or misdemeanor. Specifically, justification for the pursuit and stop of [REDACTED] hinges on whether the officers possessed reasonable suspicion that he was involved in a burglary. None of [REDACTED]’s behaviors at the inception of the interaction, as described by the officers, justify the conclusion that he was involved in criminal activity. Despite [REDACTED]’s presence in an area with a high incidence of burglaries, his presence leaning on the side of the house is innocuous behavior which may be subject to innocent or guilty interpretations. Even if he was hiding from and attempting to evade the officers as they alleged, this is open to various interpretations not necessarily indicative of criminality. The officers’ description of [REDACTED]’s flight and PO Kearon’s description that he was looking over his shoulder repeatedly is also innocuous behavior subject to interpretations of innocence and guilt as found in Moore.

Given that [REDACTED]’s behavior gave no indication of criminality, the officers only possessed an objective credible reason to approach [REDACTED] to request information. No commands were issued to [REDACTED] to attempt to ascertain what he might have been doing beside the house before or while he was moving toward the backyard. During a level one encounter, citizens are free to evade or ignore the police and officers may not pursue a subject who refuses to answer question or flees from them. Flight alone, absent circumstances indicating criminality, cannot justify a pursuit, as found in Carmichael. Thus, the officers were unjustified in pursuing [REDACTED] and escalating the encounter by requiring him to present his identification.

Per Debour, because the pursuit of [REDACTED] into the backyard to conduct a stop was unjustified at its inception, any subsequently acquired suspicion cannot be used to justify the stop. Therefore, any subsequent observations made by the officers after they had followed him, such as [REDACTED]’s argumentative demeanor, refusals to provide his ID, and presence behind the shed cannot be used to further their justification for the pursuit and stop.

Sgt. Reilly’s testimony in regards to the smell of marijuana allegedly coming from the rear of the house also cannot be used as a justification for the pursuit and stop of [REDACTED] in the backyard. At no point did Sgt. Reilly’s testimony specify that [REDACTED] possessed or was smoking marijuana. During his initial observation of [REDACTED] on the street, Sgt. Reilly could only specify that [REDACTED] was “smoking something.” Alongside the house, Sgt. Reilly could not tell if [REDACTED] was smoking anything. Even at the end of the interaction when he was in the backyard, Sgt. Reilly could not determine whether the smell of marijuana was emanating specifically from [REDACTED]. The possession of small quantities of marijuana is a violation in New York State and only the use of marijuana in public spaces, display in public places, or sale of marijuana escalates possession into a misdemeanor. Given these statutory definitions, the police could not pursue [REDACTED] for possession of marijuana or use of marijuana in his private backyard because it is not a felony or penal law misdemeanor. Further, Sgt. Reilly’s testimony about having smelled marijuana is also undermined by PO Kearon and PO Sprague who did not recall any smell of marijuana.

The officers' testimony indicates that they only possessed an objective credible reason to approach Mr. Morrison for information. Therefore, the officers' pursuit and stop of [REDACTED] into the backyard was without legal justification and it is recommended that **Allegation A, B, and C**, be closed as **substantiated**.

**Allegation D – Abuse of Authority: Police Officer Paul Kearon entered the backyard of [REDACTED]**

**Allegation E – Abuse of Authority: Police Officer Morgan Sprague entered the backyard of [REDACTED]**

**Allegation F – Abuse of Authority: Sergeant James Reilly entered the backyard of [REDACTED]**

[REDACTED] described the layout of his house during his interview (Board Review 18). The front of the house is enclosed by black gate. After entering through the front gate, there is a walkway on the right side of the house that leads to the back of the house where the backyard is situated. At the end of the house before getting into the backyard is another gate which [REDACTED] keeps open. [REDACTED] testified that he uses his backyard for private purposes and does not run any sort of business out of the backyard.

[REDACTED]'s testimony regarding the layout of his property is corroborated by the video he provided which shows the backyard, the path to the backyard, and the front of the house as the officers are leaving the premises (Board Review 19 contains the video, Board Review 20 contains a summary of the video contents). In the video, the officers are present in the rear of the backyard while [REDACTED] is alongside a white fence to an adjacent house. Throughout the recording, [REDACTED] is raising his voice and repeatedly asks the officers to go to the front of his house.



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The officers all testified that they followed [REDACTED] into the backyard immediately after exiting their car because they suspected that he might have been involved in a burglary (Board Review 7-9). They had not received any calls about burglaries before this incident occurred. No commands were issued to [REDACTED] before he was followed into the backyard.

The investigation consulted with Chief Prosecutor Jonathan Darche to discuss legal issues surrounding the entry allegation.

In *People v. Morris*, 126 A.D.3d 813 (2015), the curtilage of the home is defined as the area immediately surrounding and associated with the home or the area that is related to the intimate activities of the home (Board Review 21). The curtilage is considered part of the home. As part of the home, the curtilage is afforded Fourth Amendment protections from warrantless entries. *People v. Vernon*, 954 N.Y.S. 2d 835 (2012) outlines four factors that resolve whether an area is considered part of the curtilage of the home (Board Review 22). These factors are 1) the proximity to the house, 2) whether it is within an enclosure that surrounds the house, 3) the nature of the uses to which it is put, and 4) the steps that the resident takes to protect the area from observation.

Officers may make a warrantless entry into a constitutionally protected area when an exception to the Fourth Amendment is applicable. These exceptions include consent, hot pursuit, exigent circumstances, and emergency circumstances. *People v. Cosme*, 48 N.Y.2d 286 (1979) states that the police may make a warrantless entry into a protected area when they possess "the

Page 6

**CCRB Case # 201605421**

voluntary consent of a party who possesses the requisite degree of authority and control over the premises” (Board Review 23). The hot pursuit exception is discussed in People v. Hunter, 92A.D.3d 1277 (2012) and states that a suspect may not defeat an arrest supported by probable cause that has been set in motion in a public place by escaping into a private place (Board Review 24). The exigent circumstance exception is outlined in People v. McBride, 2010 NY Slip Op 3473 (2010) and establishes six factors that guide whether exigencies exist: 1) the gravity or violent nature of the offense with which the suspect is to be charged, 2) whether the suspect is reasonably believed to be armed, 3) a clear showing of probable cause to believe the suspect committed the crime, 4) strong reason to believe that the suspect is in the premises being entered, 5) a likelihood that the suspect will escape if not swiftly apprehended, and 6) the peaceful circumstances of the entry (Board Review 25). The emergency circumstance exception is discussed in People v. Greenleaf, 222 A.D. 2d 838 (1995) and establishes a three-factor test to apply the exception: 1) the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property, 2) the search must not be primarily motivated by intent to arrest and seize evidence and 3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched (Board Review 26).

Nothing from the officers’ testimony indicates any attempt to obtain consent from [REDACTED] or, given they believed he was possibly a burglar, someone else with a perceived legal claim to the property. The officers all testified that [REDACTED] was pursued into the backyard immediately after exiting their car. From the video provided by [REDACTED], his displeasure with the officers presence in the backyard and repeated requests for them to go to the front of the house also indicate that he never provided consent to enter the premises.

The hot pursuit, exigent circumstance, and emergency circumstance exceptions all cannot be applied to the entry into the backyard. All three exceptions require a high level of suspicion that criminality has occurred. As described in the previous section, the officers fell far short of possessing any suspicion that [REDACTED] was involved in criminality. In regards to the emergency circumstance exception, without suspicion that criminality has occurred, and without having received any calls about any burglaries, the officers could not reasonably infer that there was an immediate need for their assistance to protect life or property.

In sum, because none of the exceptions to the warrant requirement is applicable to the entry into the backyard of [REDACTED] the officers’ entry into the premises was without legal justification. Therefore, it is recommended that **Allegation D, E, and F** be closed as **substantiated**.

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Squad: 8

Investigator: \_\_\_\_\_  
Signature Print Date

Squad Leader: \_\_\_\_\_  
Title/Signature Print Date

Reviewer: \_\_\_\_\_  
Title/Signature Print Date